181 (1)

No. 10-725

In the Supreme Court of the United States

WILLIAM LAURENCE HARDY,
Petitioner,

v.

TENNESSEE DEPARTMENT OF HEALTH, DIVISION OF HEALTH RELATED BOARDS,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Tennessee, Middle Division

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether constitutional due process guarantees require dismissal of the civil administrative charges against the petitioner's medical license on the basis of his allegations that the state breached two settlement agreements with him, where the existence of any such agreement remains in dispute.

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OPINION BELOW

The January 19, 2010, decision of the Tennessee Court of Appeals is unpublished and designated "Not for Citation" in accordance with Tennessee Supreme Court Rule 4(E). (Pet. App. 45). The decision of the Davidson County Chancery Court is also unpublished. (Pet. App. 10).

STATEMENT OF JURISDICTION

The opinion of the Tennessee Court of Appeals was filed on January 19, 2010. (Pet. App. 28). On August 25, 2010, the Tennessee Supreme Court denied review and designated the Court of Appeals' opinion "Not for Citation" in accordance with Tennessee Supreme Court Rule 4(E). (Pet. App. 45). Petitioner filed a petition for writ of certiorari on November 23, 2010, invoking the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner invokes the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which reads in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const., Amend. XIV.

STATEMENT OF THE CASE

The opinion of the Tennessee Court of Appeals adequately sets forth the pertinent facts and procedural history:

On April 5, 2006, Appellee State of Tennessee Department of Health, Division of Health Related Boards ("State") filed Notice of Charges against Appellant William Laurence Hardy, M.D. ("Dr. Hardy"). Dr. Hardy responded on April 17, 2006, by filing a Motion to Dismiss. In his Motion to Dismiss, Dr. Hardy argued violations of due process, and prior accord and satisfaction. Dr. Hardy attached to his Motion: (1) the depositions of Henry Weddle and Rhonda Hooks-Kendrick and the exhibits thereto, (2) a letter dated July 12, 2005, to Dr. Hardy from Andrei Lee, Assistant General Counsel for the State, and (3) a letter dated July 18, 2006, from Stephen Johnson, counsel for Dr. Hardy, to Laurie Doty and Schean Belton, counsel for the State. The State filed a response to Dr. Hardy's Motion to Dismiss along with a Motion to Strike Dr. Hardy's Motion to Dismiss.

The administrative judge held a telephonic hearing on Dr. Hardy's Motion to Dismiss on May 1, 2007. During this hearing the administrative judge heard arguments from both parties on the Motion to Dismiss. After hearing arguments, and reviewing "the pleadings, testimony of the witnesses and a full and complete review of the record," the administrative judge denied the Motion to Dismiss. However, in addition to denying the Motion to Dismiss, the administrative judge found that the "uncontroverted proof" showed that the parties reached a settlement agreement resulting in an "Agreed Order" in May 2006, and had reached another settlement agreement prior to the alleged 2006 agreement. The

administrative judge found that the first agreement could not be "reconstituted." Pursuant to these findings, the administrative judge ordered that the "Agreed Order" be presented to the Medical Board and that neither party speak against the "Agreed Order." The administrative judge ordered the State to pay all expenses incurred after May 2006, including attorney fees. The administrative judge found that Due Process required specific performance, but that dismissal was not necessary because the "Agreed Order" could be entered. The administrative judge also held that Dr. Hardy should be allowed to renew his Motion to Dismiss on the basis of laches if the Medical Board did not approve the Agreed Order. When issuing her ruling, the administrative judge also denied the State's Motion to Strike Dr. Hardy's Motion to Dismiss. On May 8, 2007, the administrative judge entered an order reflecting this decision.

Pursuant to both parties' request, the administrative judge held the May 8, 2007 Order in abeyance to allow the parties time to further negotiate the matter. On August 14, 2007, finding that the parties were unable to reach an agreement, the administrative judge entered an order placing the prior decision into effect. The State filed a Petition for Reconsideration, which the administrative judge denied.

Dr. Hardy filed an interlocutory appeal in the Chancery Court pursuant to Tenn. Code Ann. § 4-5-322(a)(1), appealing the denial of his

Motion to Dismiss. After reviewing the administrative record, the Chancery Court entered an order on February 27, 2009, affirming the administrative judge's denial of the Motion to Dismiss, but reversing the decision of the administrative judge finding two settlement agreements. The Chancery Court made the following conclusions of law: (1) the first agreement was never memorialized in a way that would be enforceable against the state or signed by a representative of the State; (2) the July 24, 2005 letter from Dr. Hardy's former counsel is not an agreement that could bind the State or "serve as a predicate for a due process violation"; (3) the unsigned Agreed Order from 2006 is not a binding agreement; (4) because there were no binding agreements, there can be no breach; (5) the parties had not finalized their agreements, nor submitted them to the approval process; (6) Dr. Hardy's reliance on criminal constitutional jurisprudence is misplaced and this appeal is governed by civil legal standards; and (7) the State cannot be bound by "a proposed settlement agreement or a contract based on letters from opposing counsel, unsigned memoranda or orders, oral promises, or the recommendation of counsel for the State." The Chancery Court reiterated that it was concluding that the parties did not reach any enforceable settlement agreement. The Chancery Court also held that courts may not compel parties to be bound by an unsigned agreed order, as a party may withdraw his or her consent before the order is submitted. Finding that there were no enforceable agreements, the Chancery Court held that Dr.

> Hardy's due process rights had not been violated. The Chancery Court reasoned that Dr. Hardy had an opportunity for due process in the contested hearing, and that, if he had been prejudiced, the administrative judge could then consider any appropriate sanctions.

(Pet. App. 30-34) (footnotes omitted).

Dr. Hardy timely appealed the Davidson County Chancery Court's decision. On January 19, 2010, the Court of Appeals affirmed in part and reversed in part. The Court determined that there were material issues of fact in dispute with respect to the issues raised by Dr. Hardy's Motion to Dismiss, which it reviewed under the standards required for a motion for summary judgment, because the administrative judge had considered material outside the pleadings. (Pet. App. 37-38). The material issues of disputed fact concerned whether and when any settlement agreement was entered into, who had authority to enter into any such agreement, what the proper procedure was to settle the action, and what the terms were of any enforceable agreement. (Pet. App. 39). Thus, the Court of Appeals determined that the administrative judge had properly and correctly denied Dr. Hardy's dispositive motion. (Pet. App. 39).

Additionally, the Court of Appeals determined that the administrative judge had failed to follow proper legal procedure because, despite the existence of disputed material facts, she had weighed the evidence, made the factual finding that the parties had entered into two separate agreements, and ordered the parties to submit the "Agreed Order" to the Board of Medical Examiners. (Pet. App. 40-41). Furthermore, a Board

of Medical Examiners' regulation, Tenn. Adm. R. & Regs. 0880-02-.11, required that the Board approve any settlement agreement before the agreement could become final. Accordingly, either party could withdraw its consent until the agreement was presented to the Board. (Pet. App. 41). In this case, since the State disputed that it had ever agreed to settle its claim against Dr. Hardy, consent, if any, was withdrawn before the agreement was presented to the Medical Board for approval. Consequently, the Court of Appeals held that the administrative judge had erred in ordering the parties to present the "Agreed Order" to the Medical Board. (Pet. App. 41).

Finally, the Court of Appeals noted, in *dictum*, that it found unpersuasive Dr. Hardy's claim that due process required dismissal of the administrative charges against his medical license because of the state's alleged breach of settlement agreements with him. (Pet. App. 43). The Court of Appeals stated that the right to practice medicine is a constitutionally protected property interest, and that a person's liberty or property interest cannot be taken away without due process. (Pet. App. 42). However, it concluded that:

> Dr. Hardy has not provided this Court with any authority requiring his case to be dismissed and we find none in our case law. Moreover, whether the claim has been settled at all remains in dispute. The UAPA [Tennessee Uniform Administrative Procedures Act] provides for procedural safeguards in contested medical license revocation cases. See *Watts v. Burkhart*, 978 F.2d 269, 275 (6th Cir. 1992). UAPA procedure "scrupulously protects the fundamental right of notice and opportunity to

> be heard . . ." *Id.* Dr. Hardy has not alleged that he was not provided either sufficient notice of the charges against him, or an opportunity to be heard. In fact, from our review of the record, it appears that a contested hearing was set when Dr. Hardy appealed from the administrative judge's decision and was stayed pursuant to his request. Accordingly, we do not find that due process requires dismissal of the action. Dr. Hardy has been afforded due process by being given proper notice of the charges and an opportunity to be heard, where he may present evidence of the alleged settlement agreements and evidence disputing the substantive allegations.

(Pet. App. 43).

Dr. Hardy filed an application for permission to appeal to the Tennessee Supreme Court. On August 25, 2010, the Supreme Court denied the request but designated the Court of Appeals' opinion "Not for Citation" in accordance with Tennessee Supreme Court Rule 4(E). (Pet. App. 45).

REASONS FOR DENYING REVIEW

Petitioner grounds his petition for writ of certiorari on Sup. Ct. R. 10(c), contending that his case presents an opportunity for this Court to directly settle an important question of federal law that it has not yet specifically addressed, and that the Tennessee Court of Appeals' decision conflicts with relevant decisions of this Court. (Pet. 8). Petitioner is incorrect; the petition for writ of certiorari fails to identify any

"compelling reason" within the rubric of Sup. Ct. Rule 10 that would warrant this Court's review.

I. THE TENNESSEE COURT OF APPEALS' DECISION IMPLICATES NO IMPORTANT QUESTION OF FEDERAL LAW

For several reasons, the Tennessee Court of Appeals' decision implicates no important question of federal law.

First, the Tennessee Court of Appeals' decision was premised not upon federal law or constitutional jurisprudence, but upon its correct determination that, both as a matter of fact and of Tennessee state law, petitioner was not entitled to dismissal of the administrative charges against his medical license in the unique circumstances of his case. Petitioner's claim that the Department of Health reached and breached two enforceable settlement agreements with him was hotly disputed between the parties, and the Court of Appeals reached the quite unremarkable conclusion that, due to this dispute of material fact, the administrative judge correctly denied petitioner's motion to dismiss.

Petitioner produced *no contemporaneously made* evidence of an alleged agreement following negotiations between counsel in 2004 and no affidavit or other sworn testimony supporting the existence of a settlement agreement. The *only* "evidence" presented by petitioner of such an agreement was a letter from his counsel that was sent to Department counsel approximately one (1) year after the negotiations - *i.e.*, on July 28, 2005 – in response to the Department's July 12, 2005, notice that it would

proceed with administrative charges against petitioner. (Adm.R.: Vol. 2: T.R. 120-22, 123-24).[1] Petitioner's counsel at the time has since died, and his letter account of the terms of the alleged settlement agreement differed from the terms that former Department counsel believed would have been under discussion by the two; Department counsel had no memory of the events as asserted in this letter. (Adm.R.: Vol. 2: T.R. 224, 235-238).

Nor was there any settlement agreement with petitioner in 2006. The parties never finalized the terms of an agreement, and no proposed draft agreement was approved by the medical director of the Board of Medical Examiners or by the Board itself, as required by Board regulation, Tenn. Adm. R. & Regs. 0880-02-.11(4). (Adm.R.: Vol. 1: T.R. 29-42; Vol. 2: T.R. 137, 209, 454; Supp.Adm.R.: Vol. 1: T.R. 70). Even assuming *arguendo* that counsel had agreed upon the terms of an agreement, consent was withdrawn by the Department of Health before the agreement was presented to the Board of Medical Examiners for approval. Under Tennessee law, a valid consent judgment cannot be entered by a court when one party withdraws his consent and this fact is communicated to the court prior to entry of the judgment. *Harbour v. Brown*, 732 S.W.2d 598, 599 (Tenn. 1987).

Second, while the Court of Appeals' decision includes a discussion of petitioner's due process claim for dismissal of the charges against his medical license

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[1] Citations to the record are to the appellate record, including the record of the administrative proceedings, from the Tennessee Court of Appeals.

(Pet. App. 42-43), this discussion is clearly *obiter dictum*. The court stated that the due process issue was moot because it had decided the questions before it on other grounds. (Pet. App. 42).

Third, the Court of Appeals' opinion was designated "Not for Citation" by the Tennessee Supreme Court in accordance with Tenn. Sup. Ct. R. 4(E). (Pet. App. 45). As a result, the opinion has no precedential value and may not be published nor cited by any judge in any trial or appellate court decision or by any litigant in any brief unless the opinion is the basis for a claim of res judicata, collateral estoppel, law of the case, or to establish a split of authority. Tenn. Sup. Ct. R. 4(E).

All of the above considerations counsel overwhelmingly in favor of this Court's denying discretionary review.

II. THE COURT OF APPEALS' DISCUSSION, IN *DICTUM*, OF PETITIONER'S DUE PROCESS CLAIMS DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT

Petitioner's assertions to the contrary notwithstanding, examination of the Tennessee Court of Appeals' brief discussion, in *dictum*, of his due process claims reveals clearly that it does not conflict with decisions of this Court. For example, while petitioner suggests that the Court of Appeals erred by failing to separately analyze an asserted substantive due process interest in his license (Pet. 15, 18-19), this suggestion is inaccurate. The Court of Appeals concluded properly and correctly that petitioner had not provided any authority requiring that his case be dismissed on due process grounds and had, in fact,

received abundant procedural due process. (Pet. App. 43). Moreover, review of petitioner's briefs in the Tennessee Court of Appeals reveals that he never raised substantive due process arguments in that Court. Finally, petitioner misplaces his reliance on this Court's decision in *Schware v. Board of Bar Examiners of State of N.M.*, 353 U.S. 232, 246-47 (1957),[2] in which this Court held that the New Mexico Board of Bar Examiners' refusal of an application to practice law based solely upon the applicant's past membership in the Communist Party, prior arrest record, and use of aliases had no rational connection with his fitness or capacity to practice law and thus constituted a denial of his substantive due process rights. There is no such "assertion of arbitrary power" involved in petitioner's case. *Schware*, 353 U.S. at 246.

Nor does the Court of Appeals' decision conflict with this Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971), a decision concerning prosecutorial breach of a criminal plea agreement. In *Santobello*, the prior prosecutor in the case had agreed in plea negotiations to make no recommendation as to the sentence, upon the accused's agreement to plead guilty to a lesser charge. The accused entered the agreed-upon guilty plea, and the new prosecutor, apparently not knowing of the agreement, recommended a one-year sentence. The accused was sentenced to one year and took an appeal. This Court determined that the interests of justice and appropriate recognition of the duties of the prosecution

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[2] This is the first instance in which petitioner has cited *Schware* in the many briefs that he has filed in this case.

in relation to promises made in the negotiation of pleas of guilty would be best served by remanding the case to state court for determination of the relief to be accorded the accused. *Santobello*, 404 U.S. at 262-263.

In *Santobello*, however, the state did not contest that the promise had been made by the first prosecutor. Here, of course, the dispute between the parties over the existence of an agreement was *precisely* the basis for the Court of Appeals' decision. Indeed, even as it discussed petitioner's due process argument, the Court emphasized that "whether the claim has been settled at all remains in dispute." (Pet. App. 43).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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